

Supreme Court, U. S.  
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-315

PHILLIP L. NEAVEILL,

*Petitioner,*

vs.

LUDWIG ANDOLSEK, COMMISSIONER OF THE UNITED STATES CIVIL SERVICE COMMISSION, APPEALS REVIEW BOARD, GEORGIANNA J. SHELDON, ACTING CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, APPEALS REVIEW BOARD, and EMMETT COOPER, CHIEF OF THE POSTAL SERVICE OF CHICAGO, ILLINOIS,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Phillip L. Neaveill, respectfully prays that a Writ of Certiorari issue to review the judgment entered on May 26, 1978, by the United States Court of Appeals, for the Seventh Circuit, in its cause No. 78-1008.

### OPINIONS BELOW

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On October 17, 1975, the United States Postal Service, Office of the Inspector in Charge, Chicago, Illinois, rendered a decision removing the petitioner from the United States Postal Service effective October 24, 1975, said decision is reprinted herein as Appendix A.

The basis of removal related to conduct unbecoming a security police officer, impersonating a United States Postal Inspector, and possession of personal weapons while off duty.

On February 26, 1976, the United States Civil Service Commission, Chicago Field Office, sustained the decision of the United States Postal Service, Office of the Inspector in Charge, that decision is reprinted at Appendix B.

On January 24, 1977, the United States Civil Service Commission, Appeals Review Board, sustained the decision of the United States Civil Service Commission, Chicago Field Office, in the removal of the petitioner from his civil service employment, said decision is reprinted at Appendix C.

On October 31, 1977, the Honorable John Powers Crowley sustained the administrative agency ruling of removal of the petitioner from the United States Postal Service, that decision is reprinted at Appendix D.

On May 26, 1978, the United States Court of Appeals, for the Seventh Circuit, entered an unpublished order sustaining the decision of the Honorable John Powers Crowley, said unpublished order is reprinted herein at Appendix E.

### JURISDICTION

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1. The federal question that the administrative agency's decision was arbitrary and capricious in that it was contrary to the substantial evidence or rational basis test and that the order of dismissal was so harsh that it was an arbitrary and capricious abuse of its discretion was raised by the petitioner in the filing of his complaint for administrative review in terms of violating the Fifth and Fourteenth Amendments of the United States Constitution.

2. The petition for writ of certiorari was filed within ninety days after the entry of the judgment by the United States Court of Appeals, for the Seventh Circuit, Chicago, Illinois, on May 26, 1978.

### QUESTIONS PRESENTED

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1. Did the administrative agency's decision dismissing the petitioner for his off-duty conduct promote the efficiency of the United States Postal Service?

2. Was the dismissal of the petitioner so harsh that it was an arbitrary and capricious abuse of the agency's discretion?

## CONSTITUTIONAL PROVISIONS INVOLVED

### Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

### Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

From 1967 until 1972 the petitioner had been employed as a City of Chicago letter carrier by the United States Postal Service.

In 1972 until October 24, 1975, he was employed as a security police officer by the United States Postal Service.

On October 24, 1975, he was discharged from the service relating to an incident that had occurred at the Fraternal Order of Police convention on August 14, 1975, and August 15, 1975, which convention had been held in Nashville, Tennessee.

In the charges as filed by the United States Postal Service against the petitioner, it was alleged that on August 14, 1975, when the petitioner was visiting the hospitality room of the Arizona delegation of the Fraternal Order of Police at the Hyatt Regency Hotel in Nashville, Tennessee, he was disarmed of a .38 caliber revolver.

Prior to the disarming of the petitioner, it was alleged he had consumed a number of alcoholic beverages.

After the disarming of the petitioner, he was escorted to his motel, the Ramada Inn, in a marked squad car.

It is alleged that after he had been escorted to his motel room, he secured a loaded 9 mm. automatic pistol and placed it in his belt under his coat.

Upon leaving the Ramada Inn Motel, he encountered two Nashville, Tennessee, policemen.



It is further alleged that the petitioner demanded return of his .38 caliber revolver from the two policemen; at that point the second weapon, the 9 mm. automatic pistol, was removed from his person.

During the removal of the second weapon there is an allegation of a verbal confrontation between the petitioner and one of the Nashville policemen, a Mr. Turner.

On August 15, 1975, it is alleged that the petitioner was asked for identification and that he displayed his wallet which contained a badge and identification card.

At that point of identification, he allegedly was asked his status with his response being, "I am a postal inspector."

Likewise, on August 15, 1975, it is alleged that in his room at the Ramada Inn when asked for his identification status with the United States Postal Service, his response was, "Postal Inspector."

Because of the allegations enumerated herein, the petitioner was charged with conduct unbecoming, charged with impersonating a United States Postal Inspector and charged with carrying a personal weapon while off duty.

In answer to the allegations and the three charges relating thereto, the petitioner filed an answer to the effect that he had the status of a policeman under 40 U.S.C. Sec. 318 which status enabled him to carry a weapon while off duty and that he was exempt from arrest for carrying a concealed weapon on his person under the *Criminal Code of the State of Illinois*, Chap. 38, Sec. 2-15 and Sec. 24.2 (1).

Further in his answer he denies the allegations relating to him impersonating a postal inspector and not cooperating

with the Nashville Police Department concerning the two gun incidents.

At the hearing on October 17, 1975, Paul E. Cruse, Administrative Review Officer for the United States Postal Service, Chicago, Illinois, discharged the petitioner on the basis of the written allegations and charges relating thereto (Reproduced herein as Exhibit A)

On February 26, 1976, the hearing officer of the United States Civil Service Commission, Chicago Field Office, Assistant Appeals Officer Phillip N. Miller, sustained the decision of October 17, 1975, as to conduct unbecoming and impersonating a United States Postal Inspector. (Reproduced herein as Exhibit B)

As to charge III, carrying of a personal weapon while off duty, Hearing Officer Phillip N. Miller merged that charge with Charge I, conduct unbecoming.

On January 4, 1977, the United States Civil Service Commission, Appeals Review Board sustained Phillip N. Miller's decision for removal of the petitioner from the United States Postal Service. (Reproduced herein as Exhibit C)

From the decision of the United States Civil Service Commission, Appeals Review Board, the petitioner filed a complaint for review of administrative proceedings to which complaint the respondents filed their answer.

Subsequently, the respondents filed a motion for summary judgment with each party filing memoranda pertaining to that motion for summary judgment.

On October 31, 1977, the Honorable John Powers Crowley granted the respondents' motion for summary judgment; in his order the Honorable John Powers Crowley found that he had jurisdiction to dispose of the matter pursuant to 5 U.S.C. 7501, 7712, 39 U.S.C. 1005 (a), 409 (a) and 401 (1).

In that order of October 31, 1977, the Honorable John Powers Crowley supported the agency decision in terms of the rational basis test as expressed in *Wroblaski v. Hampton*, 528 F. 2d 852 (7th Cir., 1976), and *Wood v. United States Post Office Department*, 472 F. 2d 96 (7th Cir., 1973), *cert. denied*, 412 U.S. 939 (1973). (Reproduced herein as Exhibit D)

As for the severity of the discipline as imposed by the agency, the Honorable John Powers Crowley supported the agency's removal of the petitioner because of the Nashville, Tennessee, incident and his past record of one 3-day suspension and further supported the agency's decision not to accept in mitigation disciplinary measures meted out to other personnel of the United States Postal Service of which Mr. Neaveill was a member which disciplinary measures resulted in minimal suspensions and not discharges.

From the order of the Honorable John Powers Crowley, entered on October 31, 1977, the petitioner filed a notice of appeal on November 23, 1977.

On May 26, 1978, the United States Court of Appeals, for the Seventh Circuit, affirmed the judgment of the Honorable John Powers Crowley. (Reproduced herein as Exhibit E)

## REASONS FOR GRANTING THE WRIT

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### **I. THERE WAS NO CONNECTION BETWEEN THE OFF DUTY CONDUCT OF THE PETITIONER FOR WHICH HE WAS DISMISSED AND HIS ABILITY TO PERFORM IN TERMS OF THE EFFICIENCY OF THE UNITED STATES POSTAL SERVICE.**

In reviewing the record of proceedings of the hearing held by United States Civil Service Commission Officer Phillip N. Miller, the evidence adduced established that the petitioner was not on duty at the time he was attending the Fraternal Order of Police convention on August 14, 1975, and August 15, 1975, held in Nashville, Tennessee. (App. F)

The significance of that evidence is that the United States Postal Service failed to prove that any allegations relating to conduct unbecoming, impersonating a postal inspector and carrying a weapon while not on duty, had any connection with the employment performance of the petitioner as it relates to the efficiency of the United States Postal Service.

In a recent decision by the United States Court of Appeals for the Seventh Circuit, decided December 29, 1977, Case No. 76-2265, in *Charles H. Young v. Robert E. Hampton*, the Court held as follows:

"Once the agency has made a determination that the employee misconduct has, in fact, occurred, it must make a second determination. This second determination, required by 5 U.S.C. 7501 (a), must be to the effect that the disciplinary action taken against the employee will 'promote the efficiency of the service,'

(Point II). The agency may base this determination also on evidence adduced at the employee's hearing which tends to connect the employee's misconduct with the efficiency of the service; or, in certain egregious circumstances, where the adverse effect of retention of the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and where the employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may 'speak for itself.' Regardless of its basis, however, this second determination is also subject to review and also may be neither arbitrary nor capricious."

The agency must initially determine that a misconduct of an employee has in fact occurred. *Wroblaski v. Hampton*, 528 F. 2d 852 (7th Cir., 1976).

With reference to this first determination, the petitioner raised the issue that as a postal service security officer he had the right to carry a weapon under 40 U.S.C. 318 and was exempt from being arrested on the basis of the Illinois Criminal Code by virtue of having the status of a peace officer. (App. G)

In reviewing the transcript of the testimony of Police Officer Turner in connection with the grabbing of the gun from the petitioner, Officer Turner stated that the gun was grabbed without any altercation or resistance being offered (App. H) and that the gun was taken from the petitioner when he held it in his hand according to Police Officer Taylor. (App. I).

The aforesaid testimony of Police Officers Turner and Taylor corroborates the testimony of the petitioner in that the petitioner asserts that he had withdrawn the weapon and had the weapon in his hand. (App. J).

Consequently, the taking of the weapon by the police officers from the petitioner was accomplished without a struggle and without any verbal confrontation with Officer Taylor and was achieved through the cooperation of the petitioner with the police officers. (App. H).

As a result, the finding that the police officers removed the weapon by force is not correct and for that reason the decision of Assistant Appeals Officer Phillip N. Miller should be reversed.

Examining the transcript, a statement was taken by Postal Inspector Palmer of one Mr. Witt who stated that he did not remember the petitioner ever stating that he was a postal inspector and that he "jumped to the conclusion" that the petitioner was such an inspector. (App. K).

Likewise, Police Officer Taylor stated that the petitioner had identified himself merely as an officer (App. L); after the taking of the gun, Officer Taylor requested identification from the petitioner which the petitioner furnished and which identification card identified the petitioner as a postal security officer. (App. M).

Also, Officer Turner admitted that his conclusion that the petitioner was a postal inspector was based upon hearsay and not on the basis of any personal investigation. (App. N).

In his finding, Assistant Appeals Officer Phillip N. Miller states that the petitioner had proper identification for various witnesses to determine the status of the petitioner, but that those witnesses received the impression that the petitioner was a postal inspector which was the basis for his finding that the petitioner impersonated a postal inspector. (App. O).



However, when the evidence is examined, neither Police Officers Turner nor Taylor were verbally misled by the petitioner as to his employment status and therefore do not corroborate the finding of Assistant Appeals Officer Phillip N. Miller.

Likewise, the circumstances under which Cooke and Terio interviewed the petitioner, upon awakening him in his room and while he was quite sleepy, did not provide the credibility as to the oral responses of the petitioner relating to his impersonation of a postal inspector when the officers were provided with a postal badge identifying the petitioner as a postal security officer. (App. P).

Consequently, the evidence substantiated the petitioner's written denial of Charge II relating to the impersonation of a postal inspector. (App. G).

To base a finding as to the impersonation upon such oral interview by Cooke and Terio of the petitioner and by the hearsay evidence of Officers Turner and Taylor does not rationally substantiate the decision of Assistant Appeals Officer Phillip N. Miller. (App. P).

To support the decision of the administrative agency, the Honorable John Powers Crowley cited two decisions; namely, *Wroblaski v. Hampton*, 528 F. 2d 852 (7th Cir., 1976), and *Wood v. United States Post Office Department*, 472 F. 2d 96 (7th Cir., 1973), cert. denied, 421 U.S. 939 (1973).

To rebut the position of the Honorable John Powers Crowley in the citations of *Wroblaski* and *Wood*, the United States Court of Appeals for the Seventh Circuit, in *Young v. Hampton* on pages 5 and 6 of that opinion distinguishes *Wood* and *Wroblaski* from *Young* as follows:

"While this court has not explicitly addressed this second determination (the misconduct of both *Wood*

and *Wroblaski* had such a substantial adverse effect on the efficiency of the service that the connection was clear), a determination on our part that the agency had not been arbitrary or capricious in its decision that the employee's misconduct had impaired the efficiency of the service was a necessary, though implied, linchpin in both the *Wood* and *Wroblaski* decisions. Now, the situation in the instant case compels us to address this very question, the answer to which was subsumed in our earlier decisions. Can there exist a rational basis for dismissal when the adverse effect of the employee's activities cannot reasonably be deemed substantial, when the Government had adduced no evidence whatsoever (save the mere fact of a criminal conviction), and when the evidence which has been introduced at the employee's disciplinary hearing overwhelmingly supports a conclusion that there has been no adverse effect on the efficiency of the service?"

Unlike *Wood*, the petitioner did not participate in the falsification of time records which time records related to an on duty activity; unlike *Wroblaski* the petitioner did not utilize his on duty employment to secure aliens subject to deportation for his use as domestics.

Like *Young*, the petitioner was off duty when the alleged misconduct occurred; but unlike *Young* he was not arrested nor convicted of a crime.

Because the petitioner was involved in a non-duty activity as was *Young*, the standard of the *Young* case applies which requires that there be evidence to substantiate that the petitioner's misconduct would have an adverse affect upon his employment performance to the detriment of the United States Postal Service.

Reviewing the entire record, in this instance, there is no allegation nor evidence that the petitioner's alleged off

duty misconduct had any adverse affect upon his employment performance as a United States Postal Service officer.

As a result, the unpublished order of May 26, 1978, of the United States Court of Appeals, for the Seventh Circuit, should be reversed.

**II. THE DISMISSAL OF PETITIONER BY THE AGENCY, IN THIS INSTANCE, WAS SO HARSH THAT IT WAS AN ARBITRARY AND CAPRICIOUS ABUSE OF ITS DISCRETION.**

In his complaint for administrative review the petitioner, in paragraph 9, alleges that his discharge was arbitrary and capricious resulting in the violation of his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution.

In the heretofore cited *Young* decision, the Court did consider the issue of whether an agency's punishment can be arbitrary and capricious and subject to reversal when on page 19 of that opinion it states as follows:

"We believe that this determination, too, is very properly committed to the sound discretion of the agency involved; however, it is apparent that in this action, as well as in the previous two, an agency may be so arbitrary and capricious that it abuses that discretion.

The plaintiff has stoutly argued that we should hold that this punishment did not fit the crime and was, therefore arbitrary and capricious. There are several cases which we find persuasive on this point. Cf. *Slowick v. Hampton*, 470 F.2d 467 (D.C. Cir. 1972) (remanding for determination of appropriate punishment after seriousness of offense ameliorated on appeal); *Boyce v. United States*, 211 Ct.Cl. 57, 543 F.2d 1290 (1976) (determining punishment of dismissal to be unreasonably harsh for minor misconduct by

GS-2); *Power v. United States*, 209 Ct.Cl. 126, 531 F.2d 505 (1976) (holding punishment of dismissal to be unduly harsh after seriousness of offense had been ameliorated on appeal to CSC). However, our resolution of the nexus issue in the case at bar renders a decision on this disproportionality of punishment issue unnecessary. We, therefore, leave for another day the exact definition of the line which an agency must cross before punishment becomes so harsh as to be an arbitrary and capricious abuse of discretion."

In examining the aforesaid quotation, the *Young* court holds that an agency's punishment can be arbitrary and capricious and can be reversed.

However, it did not decide that question specifically in the *Young* matter, since the Court concluded that the government had failed to prove the nexus issue and therefore the matter was dispositive on that point.

But, in this instance, assuming that the nexus issue had been established, the punishment afforded the petitioner was so harsh as to be arbitrary and capricious when the evidence at his hearing established that other postal employees, unlike the petitioner, were arrested for carrying weapons and were discharged by courts of the City of Chicago in connection with carrying unlawful weapons and for carrying such weapons received merely suspensions and not discharges from the United States Postal Service.

In fact, one of the security officers has discharged his weapon at another person and for that conduct received a 10-day suspension. (App. Q).

When the Honorable John Powers Crowley rendered his decision, the *Young v. Hampton* legal thesis was not considered by him since, as was pointed out by the United

States Court of Appeals, for the Seventh Circuit, that decision was not available to him.

Consequently, Justice Crowley supported the discharge of the petitioner without considering whether that discharge, in itself, was so harsh that it was arbitrary and capricious and an abuse of discretion by the administrative agency.

In its opinion the United States Court of Appeals, for the Seventh Circuit, asserts that the agency's choice of discharge was *not so disproportionate to the conduct involved*.

However, when one considers the United States Court of Appeals for the Seventh Circuit decision in support of the petitioner's discharge, it is difficult to accept that decision when the petitioner was never arrested nor convicted of possession of unlawful weapons nor of impersonating a United States Postal Inspector and has been treated differently from other postal employees who received merely suspensions although they had been arrested for possession of unlawful weapons and, in one instance, involved the discharge of a weapon.

### CONCLUSION

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The writ should issue to the United States Court of Appeals for the Seventh Circuit in that the United States Court of Appeals should have reversed the judgment of the Honorable John Powers Crowley, Justice for the United States District Court, Northern District of Illinois, East-

ern Division, in that the off-duty conduct of the petitioner did not have an adverse affect on the efficiency of the United States Postal Service and that the discharge was so harsh that it was arbitrary and capricious with the result that the petitioner's constitutional rights relating to the Fifth and Fourteenth Amendments of the United States Constitution were violated.

Respectfully submitted,

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*Attorney for Petitioner*

# APPENDIX

—1a—

## APPENDIX A

(Letterhead Of)

### UNITED STATES POSTAL SERVICE

Office of the Inspector in Charge

Date: October 17, 1975

To: Phillip L. Neaveill SSN 340 24 7845  
Security Police Officer  
Main Post Office Tour 3

On September 23, 1975, you were issued a notice proposing to remove you from the Postal Service based on charges outlined in the notice.

I have given full consideration to your personal answer of October 2, 1975, and to your written answer of October 2, 1975, and all other evidence of record. I find, however, that the charges stated in the notice of September 23, 1975, are fully supported by the evidence and warrant your removal from the Postal Service. In reaching this decision, I have considered the element of your past record cited in the notice of September 23, 1975. The removal will be effective October 24, 1975.

As a veteran, you have the right to appeal this decision in writing to either the U. S. Postal Service, Chief Inspector C. Neil Benson, 475 L'Enfant Plaza West, SW, Washington, DC 20260 marked to the attention of the Assistant Chief Inspector-Administration within 15 days from October 24, 1975, or to the U. S. Civil Service Commission, Federal Employee Appeals Authority, Chicago Field Office, 230 S. Dearborn Street, 31st Floor, Chicago, IL 60604 within the same time limits. If you do not appeal to the Civil Service Commission within the above time limit you will have no further appeal right to the Civil Service Commission. If you appeal to the Civil Service Commission,



you will have no further right to appeal within the U. S. Postal Service. If you appeal to the U. S. Postal Service, please furnish a copy of your appeal to Regional Chief Inspector W. H. McGuill, Central Region, 433 W. Van Buren Street, Room 712, Main Post Office, Chicago, IL 60607, also direct a copy of your appeal to me and in your appeal you should state whether you do or do not wish a hearing.

If you appeal this action to either the U. S. Postal Service or the Civil Service Commission, you will remain on the rolls, but in a non-pay status after the effective date of this action, until disposition of your case has been had either by settlement or through exhaustion of your administrative remedies.

You are entitled to a representative of your own choosing throughout your appeal. You and your representative, if he is a U. S. Postal Service employee, shall be afforded a reasonable amount of official time for preparation of your case if you and/or your representative are otherwise in a duty status.

/s/ Paul E. Cruse  
Security Officer in Charge

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## APPENDIX B

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*(Letterhead Of)*

### UNITED STATES CIVIL SERVICE COMMISSION

Federal Employee Appeals Authority  
Chicago Field Office  
Chicago, Illinois 60604

APPEAL OF MR. PHILLIP L. NEAVEILL  
UNDER PART 752, SUBPART B  
OF THE CIVIL SERVICE REGULATIONS  
DECIDED ON: FEBRUARY 26, 1976

#### INTRODUCTION

Mr. Neaveill, hereinafter referred to as the appellant, appealed to the Commission by letter dated November 3, 1975, from the decision of the U. S. Postal Service to remove him from the service effective October 25, 1975. Prior to that time he was employed as a Security Police Officer, PS Level 6, \$14,019 per annum with the Inspection Service, Chicago Division, Chicago, Illinois.

The appellant is a veterans' preference eligible and is entitled to appeal rights to the Commission under Subpart B of Part 752 of the Civil Service regulations. He has served over one continuous year in the Postal Service and his removal is an appealable adverse action within the purview of the regulations. The appeal is timely.

In conjunction with his appeal, the appellant was afforded a hearing on January 12, 1976 in Chicago, Illinois. He was represented by Mr. Stanley H. Jakala, Attorney and the employing agency was represented by Mr. James F. McCarthy, Postal Inspector.

#### ANALYSIS AND FINDINGS

By letter dated September 23, 1975, Mr. Obie P. Breaux, Jr., Security Supervisor, notified the appellant of the proposal to remove him from the service no earlier than thirty five days from his receipt thereof for the following reasons:

Charge No. 1—You are charged with conduct unbecoming a Security Police Officer as shown:

On the evening of August 14, 1975, and the morning of August 15, 1975, while off duty, you attended a national convention of the Fraternal Order of Police in Nashville, Tennessee.

When in the Hospitality Room of the Arizona Delegation of the F.O.P. at the Hyatt Regency Hotel you consumed a number of alcoholic beverages, after which, while seated on a couch you attempted to remove a .38 caliber revolver from a shoulder holster concealed under your coat. At that time the weapon was taken away from you.

You were escorted out of the hotel to a marked police car which had been summoned. You were then taken in the car to your motel, the Ramada Inn. Detective James L. Thompson, Phoenix, Arizona Police Department accompanied you to your room on the third floor. After you entered the room and the door was closed, Mr. Thompson returned to the police car by using the stairway.

You obtained a loaded 9MM automatic pistol from your room and placed it in your belt, under your coat. You then took the elevator down and went outside to the police car. You arrived there before Mr. Thompson. After some discussion between you and Police Officer Aubrey Turner, Nashville, Tennessee Police Department Mr. Thompson arrived.

You twice stated to Mr. Turner you wanted your gun back. Mr. Turner told you they could turn your gun over to the police department property room but you would not get the gun back. At that time you started

to reach under your sport coat toward your belt. As you started to pull your automatic pistol out, Mr. Turner with the help of Mr. Thompson disarmed you. The gun was loaded and there was a bullet in the chamber. You then had a verbal confrontation with Mr. Turner.

Charge No. 2—You are charged with impersonating a U. S. Postal Inspector, as shown:

While off duty and in Nashville, Tennessee during the morning of August 15, 1975, after Police Officer Aubrey Turner, Nashville, Tennessee Police Department with assistance from James L. Thompson, Detective, Phoenix, Arizona Police Department took your automatic pistol away from you, you were asked for identification. You took out your wallet which contained a badge and an identification card. At that time, in the presence of Mr. Thompson you stated, "I am a Postal Inspector."

On the morning of August 15, 1975, in your room at the Ramada Inn, Nashville, Tennessee when asked for identification you, in the presence of Officer James W. Cooke, Jr. of the U. S. Capital Police, Washington, DC, stated you were a Postal Inspector.

Charge No. 3—You are charged with carrying your personal weapons while off duty as shown:

On the evening of August 14, 1975, and the morning of August 15, 1975 while off duty and in Nashville, Tennessee your personal .38 caliber revolver concealed in a shoulder holster was taken away from you in the Hyatt Regency Hotel. Your personal automatic pistol placed in your belt, concealed under your coat was taken away from you outside the Ramada Inn.

In addition, the following element of your past record will be considered in arriving at a decision if the charges are sustained:

1. You were suspended three days for withholding information pertinent to an official investigation and fail-

ure to cooperate fully in an official investigation. (A. copy of which is attached.)

The reasons, as set forth, are found to be of sufficient detail and specificity to allow the appellant an opportunity for reply and refutation. He was carried in duty status during the advance notice period. He was given the reasonable time of ten days in which to respond to the charges either in writing, in person, or both. The proposal notice also notified the appellant of his right to review the material relied upon to support the charge; where that material would be made available to him; that he might present appropriate documentation including written affidavits in support of his answer; and that he would be afforded a reasonable amount of official time for the above if he were otherwise in an official duty status.

On October 2, 1975, the appellant, through his attorney, appeared before Mr. Paul E. Cruse, Security Officer in Charge, and read from a prepared statement which was also submitted as the appellant's written reply. Mr. Cruse issued the agency decision on October 17, 1975, through which he informed the appellant that he found the charges as stated in the proposal notice fully supported by the evidence; also that these reasons, with consideration of the one element of the appellant's past record, warranted his removal from the Postal Service effective October 24, 1975. The appellant was further advised of his right to appeal to the Commission and of the time limits and procedures to be observed in making such an appeal.

Based on the foregoing, it is found that the agency met the mandatory procedural requirements of Part 752, Subpart B, of the Commission regulations in its processing of the appellant's removal from the service.

In regards to Charge No. 1, the appellant, in his written reply to the charge, stated that he neither admitted nor denied the allegation that he "attempted to remove a .38 caliber revolver from a shoulder holster concealed under (his) coat." He denied that his actions constituted conduct

unbecoming a Security Police Officer. He testified that just prior to supper, about 5:00 p.m., on August 14, 1975, he had taken Librax for a "nervous stomach"; that he went to said hospitality room where he recalled having four or five "Margaritas"; that he sat down on a couch; and that the next thing he could remember was being escorted out of the hotel (Hrng. Trsep. pp. 14, 156). When queried concerning his allegedly being disarmed, the appellant stated that when Mr. Thompson left his motel room he (appellant) left the motel with the intention of getting back his .38 caliber revolver. The transcript reflects the following examination concerning his allegedly being disarmed from his 9MM pistol: (Hrng. Trsep. p. 159)

Q. And did you have any conversation with him, if you recall?

A. To my recollection I was asked "Where are you going" and I said "I am going back over to the hotel and find the guy who has got my gun. I want to know what he is going to do with it." For all I knew, I at that time thought that the Arizona policeman was either a detective or off-duty Nashville policeman and thought the man was going south with my gun.

Q. And during the period of time when you were on the street with the officer in this conversation, was there anything else said that you recall?

A. Yes, I was asked where I was going and I pointed (indicating). My coat opened up and he must have seen the butt of that pistol and he said "Do you have a gun?" I said "Yes," and I withdrew it and handed it to him.

Q. Well, did they disarm you?

A. They removed it from my hand—

Q. I see. Now—

A. (Continuing) —or accepted it, if you want to say removed or accepted it.

Called on behalf of the agency, Nashville Police Officers Taylor and Turner both testified that when the appellant reappeared after having been escorted to his room, Mr.



Taylor asked him where he was going and he replied to the effect that he "was going to get my God damn gun back"; that the appellant then reached inside his sports coat and pulled out the pistol; that Officer Turner grabbed the gun away from the appellant; and that the gun was loaded with one round in the chamber. Officer Taylor testified that the appellant was not asked if he had a gun before he was disarmed. (Hrng. Trsep. pp. 52, 53, 78)

In his reply to the proposal notice, the appellant stated that he had taken the weapons to Nashville "for purposes of self-protection and for purposes of preventing removal of same from his premises occupied by his mother during his absence." He further argued that while agency regulations prohibit Security Police Officers from carrying service revolvers off duty, the guns in question were his personal weapons and "under Chap. 38 of the *Criminal Code of the State of Illinois*, Sec. 24-2 (1) peace officers are exempt from being arrested for carrying concealed weapons on their person." He stated that he was not aware that he was not afforded the same protection under Tennessee law until after the incidents in question.

The only matter in dispute in this charge is if appellant handed the weapon to the officers upon their request or if they took it from him by force. It is herein found that the latter was, in fact, the case based upon the persuasive testimonies of the police officers. The fact that the appellant was not actually arrested and might not have been arrested in Illinois is not found to be material to the charge. It is clear that the appellant was using his position as a Security Police Officer as justification for carrying weapons which in fact had no relationship to his official duties. It is further found that Charge 1 as stated is supported by the evidence and that the appellant's action as described therein did constitute conduct unbecoming a Security Police Officer.

As part of the material upon which it based Charge 2, the agency furnished an affidavit from Mr. James Thompson.

He stated that on the occasion in question, the appellant was asked for identification, whereupon he took out a wallet which contained a badge and an identification card and stated "I am a Postal Inspector." Officers Taylor and Turner testified to virtually the same facts. (Hrng. Trsep. pp. 54, 78)

The agency also furnished affidavits from Mr. James W. Cooke, Jr., and Mr. C. J. Terio, both of the U. S. Capitol Police, in which they stated that they approached the appellant in his motel room on the morning of August 15, 1975 to question him about the incidents of the previous night; that he initially told them that he was a Postal Inspector; and that they subsequently found his identification card and badge.

The appellant testified that he did not recall telling anyone at the time he was relieved of his 9MM gun that he was a postal inspector. (Hrng. Trsep. p. 162); that when confronted later that morning in his room, he was asked "What is your employment status?"; and that he replied that he was "with the Postal Service, Postal Inspection Service, Security Police." (Hrng. Trsep. p. 163)

Notwithstanding the fact that the appellant's identification card (Appellant's Exhibit No. 2) clearly indicated he was a Security Police Officer, those identified above received the impression that he was a Postal Inspector. It is herein concluded that they received that impression just as they stated, by the appellant identifying himself as such. Motivation for such action was provided through uncontroverted testimony to the effect that Postal Inspectors may legally carry concealed weapons in Tennessee while Security Police Officers may not. The second charge is found to be fully supported by the evidence.

In regards to Charge 3, the specifications are found to constitute some of the basic elements of the first charge. These specifications are fully discussed under that charge. While the specifications themselves are found supported by the evidence, this reason will not herein be considered as a separate and distinct charge.



It is noted that with respect to the appellant's past record, he was informed of the action in writing, it was made a matter of record, and he was given the opportunity to dispute the action by having it reviewed, on its merits, by an authority different from the one who took the action. Thus, it is found that the specificity and detail requirements of Part 752 of the regulations were met. Hence the suspension could be considered in determining the severity of action proposed. Although appellant took exception to the disciplinary action, based on a review of the record, it is found that the reasons for this action were not arbitrary, or capricious.

The appellant presented further argument to the effect that the Postal Service more severely disciplined the appellant than other employees who were found to have violated agency regulations in regards to the use of or the carrying of weapons. Seven witnesses were called in respect to this issue. In one case the agency was in the process of taking action but had issued no decision as to the actual form of disciplinary action. In another case no suspension had been imposed but there was no evidence that the agency was aware of any violation of regulations. Four individuals had received five day suspensions and one a ten day suspension. The witness who received the ten day suspension testified that this arose out of an incident wherein he fired a revolver in self defense. Those who received five day suspensions were involved in relatively less serious incidents.

It is found that even in the case of the Security Police Officer who received the ten day suspension, the actions of those who received only suspensions were significantly less serious than the actions of the appellant which precipitated his removal. Accordingly, it is found that the appellant's penalty was not comparable to the others.

The reasons set forth as the basis for the appellant's removal are found fully supported by the evidence of record and not mitigated by information presented by the appellant. In light of the reasons, including the complain-

ant's past record, it is found that his removal was neither arbitrary nor capricious, but was for such cause as would promote the efficiency of the service and is therefore sustained.

#### DECISION

It is the decision of this Authority that no change be made in the personnel action of the U. S. Postal Service in removing the appellant from its rolls on October 25, 1975.

The decision of the Federal Employee Appeals Authority is final and there is no further right of administrative appeal.

For the Commission:

/s/ Leland L. Walton  
Chief Appeals Officer

/s/ Phillip N. Miller  
Assistant Appeals Officer

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#### APPENDIX C

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(Letterhead Of)

UNITED STATES CIVIL SERVICE COMMISSION

Appeals Review Board  
Washington DC 20415

04 Jan 1977

Mr. Stanley H. Jakala  
Attorney at Law  
3219 Maple Avenue  
Berwyn, Illinois 60402

Dear Mr. Jakala:

This is in further reference to your March 23, 1976 communication, requesting, in behalf of Mr. Phillip L. Neaveill (hereafter, the appellant), reopening and reconsideration

of the February 26, 1976 decision of the Chicago Field Office, Federal Employee Appeals Authority, in the appellant's case.

Section 772.310 of the Civil Service regulations provides that the Appeals Review Board may reopen and reconsider a decision of an FEAA Appeals Officer when the party requesting reopening submits written argument or evidence which tends to establish that:

- (1) New and material evidence is available that was not readily available when the decision of the Appeals Officer was issued;
- (2) The previous decision of the Appeals Officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or
- (3) The decision of the Appeals Officer is of a precedential nature involving new or unreviewed policy considerations that may have effects beyond the case at hand.

You contend that the Field Office erroneously interpreted Chapter 38 of the Criminal Code of the State of Illinois, Section 24-2(1), relating to peace officers and that the decision misapplies the aforementioned section as it pertains to the appellant. The Board interprets this contention as referring to the Field Office's finding that the fact that appellant was not actually arrested and might not have been arrested in Illinois was not material to the charge, i.e., reason one.

The first reason cited in the agency's notice of proposed removal of the appellant is "conduct unbecoming a Security Police Officer." The specifications to this charge set forth conduct at a convention site in another State where the appellant, who allegedly had been drinking, attempted to remove a pistol from his person and, after the weapon had been seized and turned over to local police officers, obtained another pistol and attempted to secure return of the first weapon from the police officers, who then seized

the second weapon. Neither the charge nor supporting specifications stated whether the weapons were official weapons or personal weapons, or that the appellant was in unlawful possession of the weapons. As the gravamen of the charge is the appellant's conduct while in possession of the weapons rather than mere possession of the weapons, the Board finds that the Field Office correctly found that the Illinois Criminal Code was not material to the charge.

Your further contentions concerning the sufficiency of the evidence to support the charges, as well as the disparity in the penalties for similar offenses, go to the merits of the case. The Board does not, in considering a request to reopen under the criteria set forth in section 772.310 of the regulations, evaluate the evidence or substitute its judgment for that of the Field Office as to the merits of the case.

In light of the above, the Board finds that your request did not meet any of the regulatory criteria for reopening. Accordingly, the request to reopen this case is hereby denied and the decision of the FEAA Chicago Field Office remains the final Commission decision in this matter.

For the Board:

Sincerely yours,  
/s/ Herman D. Staiman  
Chairman

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**APPENDIX D**

**UNITED STATES DISTRICT COURT**  
Northern District Of Illinois  
Eastern Division

**ORDER OF HONORABLE**  
**JOHN POWERS CROWLEY**

The motion of all federal defendants for summary judgment is granted. (Draft)

October 31, 1977

**IN THE UNITED STATES DISTRICT COURT**  
For The Northern District Of Illinois  
Eastern Division

**MEMORANDUM OPINION AND ORDER**

John Powers Crowley, District Judge

The plaintiff has filed this complaint for review of Administrative Proceedings asserting jurisdiction under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* The named defendants are commissioners of the United States Civil Service Commission and the Chief of the Postal Service in Chicago. The government has moved for summary judgment on behalf of all the federal defendants, and for the reasons noted below we grant that motion.

Phillip Neaveill, the plaintiff, entered employment with the Postal Service as a city letter carrier in 1967. In 1972 he became a Security Police Officer and remained in that position until the effective date of his discharge on October 25, 1975. The substantive basis for the discharge was a charge of conduct unbecoming a Security Police Officer

and related charges of impersonating a U. S. Postal Inspector and of carrying personal weapons while off duty; all of these charges grew out of a series of incidents which occurred during Mr. Neaveill's participation in a national convention of the Fraternal Order of Police in Nashville, Tennessee on August 14 and 15, 1975.

On September 23, 1975, the Security Supervisor notified the plaintiff of the charges and proposed to remove him from his position in thirty days. An answer was filed on October 2, 1975 by the plaintiff's attorney, and this response was considered before the issuance of a decision letter on October 17, 1975, finding that the charges were "fully supported by the evidence and warrant . . . removal from the Postal Service." Plaintiff elected to appeal this decision to the Federal Employees Appeal Authority of the United States Civil Service Commission (FEAA) in Chicago. The record evidence for this appeal was developed during an administrative hearing before an Appeals Office on January 12, 1976. The full transcript of this hearing including the testimony of plaintiff and eleven other witnesses, as well as substantial documentary evidence, has been filed with this Court. The opinion of the officer hearing the appeal, dated February 26, 1976, was that the plaintiff had been properly afforded all of the procedural rights guaranteed under the Civil Service Regulations (5 C.F.R. §752) and that the evidence presented was sufficient to support the charges. A request to reopen and reconsider the February, 1976 decision was lodged with the Appeals Review Board of the U.S. Civil Service Commission on March 23, 1976, but this request was denied under 5 C.F.R. §772.310 on January 4, 1977. Following this exhaustion of his administrative remedies, Mr. Neaveill filed suit in this Court.

The primary charge involved conduct unbecoming a Security Police Officer. Briefly, it was charged that while in Nashville, Tennessee on April 14, 1975, Neaveill became intoxicated in the Hospitality Room of the Arizona Delegation at the National Council of the Fraternal Order of



Police and attempted to remove a .38 caliber revolver from a concealed shoulder holster. At that time the weapon was taken away, and he was accompanied back to his own hotel by an Arizona policeman in a local police car manned by two Tennessee patrolmen. After Neaveill entered his room, the Arizona detective closed the door and returned to the squad car via the hotel stairs. In the meantime, Neaveill tucked a loaded 9MM automatic pistol in his belt under his coat and headed back to the squad car via the elevator. When he reappeared on the street, the Nashville officers asked him where he was going; "to get my God damn gun back" was the reply. At that point Neaveill pulled the gun from his belt and it was taken from his hand by the officers. He was escorted back to his room and retired for the night.

The second charge of impersonating a U.S. Postal Inspector was also sustained through the appeals process. Though it was found that the plaintiff's identification card clearly indicated that he was a Security Police Officer, those testifying at the hearing received from Mr. Neaveill the impression through oral responses to questioning at the time of the incident in Nashville and on the following morning, that he was a Postal Inspector.

The third charge of carrying personal weapons while off duty was judged by the hearing officer to be subsumed under the first charge of conduct unbecoming a Security Police Officer and was not ultimately considered as a separate and distinct charge. Plaintiff's argument that "Chap. 38 of the *Criminal Code of the State of Illinois*, Sec. 24-2 (1) exempts peace officers from arrest for carrying concealed weapons on their persons" despite the fact that agency regulations forbid Security Police Officers from carrying service revolvers while off duty, was not found to be material to the resolution of the charges against him.

Furthermore, at the hearing testimony was presented and considered on the question of the severity of the discipline in this case. It was decided that the reasons for

the removal of the plaintiff and his past record of suspension were not mitigated by the additional information regarding the Nashville incident or by comparative reports on agency decisions in other disciplinary actions involving weapons.

The plaintiff has sought our review of this matter asserting jurisdiction under 5 U.S.C. §§701, *et seq.* Although these provisions have been made inapplicable to the operation of the United States Postal Service by 39 U.S.C. §410(a), the Postal Service does acknowledge and submit to subject matter jurisdiction in this case pursuant to 5 U.S.C. §§7501, 7712; 39 U.S.C. §§1005(a)(2), 409(a) and 401(1).

We find the scope of our judicial review in this situation very limited; our determination must be based on the administrative record before us, and no *de novo* evidentiary hearing is permitted. *Marsden v. United States*, 410 F. Supp. 289 (Minn., 1976); *Polcover v. Secretary of the Treasury*, 477 F. 2d 1223 (D.C. 1973). Within the Seventh Circuit the requirement is only that the decision of the agency be supported by some rational basis. *Wroblaski v. Hampton*, 528 F. 2d 852 (7th Cir., 1976), *Wood v. United States Post Office Department*, 472 F. 2d 96 (7th Cir., 1973), *cert. denied*, 412 U.S. 939 (1973).

As we read the record plaintiff clearly was aware of the regulations of the Postal Service and reinforcing directives of the Inspector in Charge which state that "authority to carry official weapons does not extend to carrying of personal weapons while off duty." Testimony established that after a period of drinking, he was twice disarmed of loaded firearms following altercations with other police officers at a convention of the Fraternal Order of Police in Nashville, Tennessee, on August 14 and 15, 1975. It was further found that the plaintiff had given verbal answers indicating that he was a Postal Inspector to those investigating the Nashville incident. Since the administrative record contains evidence validating these find-



ings, we must conclude that there is a rational basis which supports the removal of the plaintiff from the Postal Service in accordance with all the proper disciplinary procedures and appeals.

The motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure is granted on behalf of all the federal lefendants.

/s/ John Powers Crowley  
United States District Judge

Dated: October 31, 1977.

UNITED STATES DISTRICT COURT  
For The Northern District Of Illinois  
Eastern Division

#### JUDGMENT

This action came on for hearing before the Court, Honorable John Powers Crowley, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of all federal defendants for summary judgment is granted.

Dated at Chicago, Illinois, this 31st day of October, 1977.

H. Stuart Cunningham  
Clerk of Court  
/s/ Barbara J. Brotherson  
Deputy Clerk

#### APPENDIX E

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
(ARGUED MAY 24, 1978)

May 26, 1978.

UNPUBLISHED ORDER  
NOT TO BE CITED  
PER CIRCUIT RULE 35

#### ORDER

The Court, having read the briefs, addressed itself to the record, and heard oral argument, announced in open court that the judgment appealed from is AFFIRMED.

As stated in Judge Crowley's decision, there is a rational basis for the determination made by the agency. Although the decision of this Court in *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977) was not available to the agency or the district court, we think the two determinations required by that decision are sufficiently supported by the record in this case. This is one of the cases referred to in *Young* where the circumstances underlying the dismissal make it readily appear that retention of the employee can rationally be found to have an adverse effect on the efficiency of the service. The agency's choice of discharge was not so disproportionate to the conduct involved as to be arbitrary or capricious.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

AFFIRMED.

## APPENDIX F

Sept. 23, 1975

Phillip L. Neaveill SSN 340 24 7845  
Security Police Officer  
Main Post Office—Tour 3

This is advance written notice that it is proposed to remove you from the U. S. Postal Service no sooner than 30 days from the date of your receipt of this letter.

This action is based on the following charges:

Charge No. 1—You are charged with conduct unbecoming a Security Police Officer as shown:

On the evening of August 14, 1975, and the morning of August 15, 1975, while off duty, you attended a national convention of the Fraternal Order of Police in Nashville, Tennessee.

When in the Hospitality Room of the Arizona Delegation of the F.O.P. at the Hyatt Regency Hotel you consumed a number of alcoholic beverages, after which, while seated on a couch you attempted to remove a .38 caliber revolver from a shoulder holster concealed under your coat. At that time the weapon was taken away from you.

You were escorted out of the hotel to a marked police car which had been summoned. You were then taken in the car to your motel, the Ramada Inn. Detective James L. Thompson, Phoenix, Arizona Police Department accompanied you to your room on the third floor. After you entered the room and the door was closed, Mr. Thompson returned to the police car by using the stairway.

You obtained a loaded 9MM automatic pistol from your room and placed it in your belt, under your coat. You

then took the elevator down and went outside to the police car. You arrived there before Mr. Thompson. After some discussion between you and Police Officer Aubrey Turner, Nashville, Tennessee Police Department Mr. Thompson arrived.

You twice stated to Mr. Turner you wanted your gun back. Mr. Turner told you they could turn your gun over to the police department property room but you would not get the gun back. At that time you started to reach under your sport coat toward your belt. As you started to pull your automatic pistol out, Mr. Turner with the help of Mr. Thompson disarmed you. The gun was loaded and there was a bullet in the chamber. You then had a verbal conversation with Mr. Turner.

Charge No. 2—You are charged with impersonating a U. S. Postal Inspector, as shown:

While off duty and in Nashville, Tennessee during the morning of August 15, 1975, after Police Officer Aubrey Turner, Nashville, Tennessee Police Department with assistance from James L. Thompson, Detective, Phoenix, Arizona Police Department took your automatic pistol away from you, you were asked for identification. You took out your wallet which contained a badge and an identification card. At that time, in the presence of Mr. Thompson you stated, "I am a Postal Inspector."

On the morning of August 15, 1975, in your room at the Ramada Inn, Nashville, Tennessee when asked for identification you, in the presence of Officer James W. Cooke, Jr. of the U. S. Capitol Police, Washington, DC, stated you were a Postal Inspector.

Charge No. 3—You are charged with carrying your personal weapons while off duty as shown:

On the evening of August 14, 1975, and the morning of August 15, 1975 while off duty and in Nashville, Tennessee your personal .38 caliber revolver concealed in

a shoulder holster was taken away from you in the Hyatt Regency Hotel. Your personal automatic pistol placed in your belt, concealed under your coat was taken away from you outside the Ramada Inn.

In addition, the following element of your past record will be considered in arriving at a decision if the charges are sustained:

1. You were suspended three days for withholding information pertinent to an official investigation and failure to cooperate fully in an official investigation. (A copy of which is attached.)

You may review the material relied on to support the reasons for this notice at the office of the Security Officer in Charge P. E. Cruse. If you do not understand the reasons for this notice, contact Security Officer in Charge P. E. Cruse for further explanation.

You may answer these charges within ten days from your receipt of this letter, either in person or in writing, or both, before Security Officer in Charge P. E. Cruse at the office of the Security Officer in Charge between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. You may also present appropriate documentation, including written affidavits, to Security Officer in Charge P. E. Cruse within ten days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. You will receive a written decision after expiration of the ten day period for reply. All the facts in your case, including any reply you may submit, will be given full consideration before a decision is rendered.

/s/ Obie P. Breaux, Jr.  
Security Supervisor

I have received the original of this letter 09-23-75  
Signature Phillip L. Neaveill

Time 1545

## APPENDIX G

### ANSWER TO UNITED STATES POSTAL SERVICE LETTER OF SEPTEMBER 23, 1975

Subject: Phillip L. Neaveill SSN 340 24 7845  
Security Police Officer  
Main Post Office—Tour 3

Now Comes, Phillip L. Neaveill, defendant, by Stanley H. Jakala, his attorney and answers as follows Charges I, II, and III of a United States Postal Service letter dated September 23, 1975:

#### CHARGE I

1. That he admits the allegations of paragraph 2 of the said Charge I.
2. That he admits the allegations of paragraph 3 of the said Charge I except that he neither admits nor denies an attempt by him to remove a .38 caliber revolver from a shoulder holster concealed under his coat and requires strict proof thereof.
3. That he admits the allegations of paragraph 4 of the said Charge I.
4. That he admits the allegations of paragraph 5 of the said Charge I except he denies the allegations he pulled his automatic pistol with Mr. Turner and Mr. Thompson disarming him; further he denies any verbal confrontation with Mr. Turner.

Further answering he affirmatively states that his conduct was not unbecoming a Security Officer in that he was not arrested for unlawful possession of weapons nor for resisting arrest; further answering he affirmatively states that he voluntarily cooperated with the United States Postal Inspectors on August 16, 1975 and September 2, 1975 wherein he provided his reasons for having the aforesaid weap-



ons in his possession; namely, for purposes of self-protection and for purposes of preventing removal of same from his premises occupied by his mother during his absence from the said premises while attending the Fraternal Order of Police Convention in Nashville, Tennessee.

Further answering he affirmatively states that under Title 40 *U. S. Code* 318, special policemen are provided the same powers as sheriffs and constables in the conduct of their duties on Federal property, a photostatic copy of the aforesaid Title 40 *U. S. Code* 318 is attached and marked Exhibit A of this Answer;

That, as a security officer of the United States Postal Department, he is required to carry a weapon for purposes similar to that of a special police officer under Title 40, *U. S. Code* 318;

That under Chap. 38 of the *Criminal Code of the State of Illinois*, Sec. 2-15 he is considered a peace officer in that he is entitled to make arrests for limited offenses, a copy of the said section is attached and marked Exhibit B;

That under Chap. 38 of the *Criminal Code of the State of Illinois*, Sec. 24-2 (1) peace officers are exempt from being arrested for carrying concealed weapons on their person, a photostatic copy of the aforesaid section is marked Exhibit C and made part of this Answer.

(Exhibit C was not attached to this answer.)

#### CHARGE II

1. That he neither admits nor denies the allegations of paragraph 1 of the said Charge II and requires strict proof thereof; further answering he states that the Investigative Officers were provided voluntarily by him with his identification card and identification badge which clearly identifies his status.

2. That he neither admits nor denies the allegations of paragraph 2 of the said Charge II and requires strict proof thereof; further answering he states that the Investigative

Officers were provided voluntarily by him with his identification card and identification badge which clearly identifies his status.

#### CHARGE III

1. That he admits the allegations of paragraph 1 of Charge III except that he denies the inference that the personal automatic pistol was so concealed and taken away from him that it implies non cooperation by him with Investigative Police Officers.

Further answering he affirmatively states the aforesaid weapon was in his possession for purposes of self-protection and purposes of preventing removal of said weapon from premises occupied by his mother during his absence from said premises while attending the Fraternal Order of Police Convention in Nashville, Tennessee.

Further answering, he realleges and readopts the affirmative defenses in answer to Charge I relating to the cited Title 40 of the *U. S. Code* 318, Chap. 38 of the *Criminal Code of the State of Illinois*, Sec. 2 Subsec. 13, and Chap. 38, Sec. 24-2 Subsec. (a) (1) as the same affirmative defense in Answer to Charge III.

Further answering he affirmatively states that he was unaware prior to his interrogation by Tennessee Police Officers and Postal Inspectors that the Tennessee law was contrary to Chap. 38 of the *Criminal Code of the State of Illinois* in terms of Sec. 2 Subsec. 13, and Chap. 38, Sec. 24-2 Subsec. (a) (1).

Further answering he affirmatively states that although he had been suspended for three days in a prior incident, his record contained no other suspensions; further answering he states that he has one of the best blotter records.

Wherefore, Defendant Prays that he not be removed from the United States Postal Service on the basis of Charges I, II and III of a letter dated September 23, 1975.

/s/ Phillip L. Neaveill



## APPENDIX H

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- 88 Q. (Continuing) —you saw his coat open, right?  
A. Yes, sir.  
Q. You saw him reach in?  
A. Yes, sir.  
Q. Pulled out the gun, you say?  
A. Yes, yes, sir.  
Q. At that point, you grabbed it, right?  
A. Yes, yes, sir.  
Q. Was there an altercation?  
A. No, sir, there wasn't. Just Officer Thompson was standing on the opposite side of him and he grabbed Mr. Neaveill and I grabbed the gun and put him up against the side of the car.  
Q. No resistance of any sort, is that right?  
A. No, sir.  
Q. No discussion?  
A. Well, we asked him what he was doing, you know, what he thought he was doing.  
Q. And what did he say?  
A. He just said he wanted his gun back.  
Q. That's all he said to you, is that correct?  
A. Yes, sir.

\* \* \*

## APPENDIX I

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- 65 A. It was inside his sports coat.  
Q. Where, right here? (Indicating)  
A. Approximately about right here. (Indicating)  
Q. When did you notice it for the first time?

A. When he slipped his hand between his shirt tail, which was out and his—between his shirt tail and his sports coat.

Q. Now, you say he had this—the loaded gun in his hand, is that right?

A. Yes.

Q. And did he offer any resistance when you asked for the gun?

A. We didn't ask for the gun.

Q. You just took the gun from him?

A. Yes.

Q. Did he fight you?

A. He didn't have much choice to fight.

Q. So, in other words, he just—you just took the gun away from him and that was it.

A. It was as simple as that.

\* \* \*

## APPENDIX J

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- 160 A. Yes, I was asked where I was going and I pointed (indicating). My coat opened up and he must have seen the butt of that pistol and he said "Do you have a gun?" I said "Yes," and I withdrew it and handed it to him.

Q. Well, did they disarm you?

A. They removed it from my hand—

Q. I see. Now—

A. (Continuing) —or accepted it, if you want to say removed or accepted it.

Q. Was there any verbal exchange at that point, any discussion?

A. No.

Q. Then Mr. Neaveill after that, where did you go?

A. I was taken back up to my room.

Q. And then you went to sleep and retired?

A. Yes.

\* \* \*

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## APPENDIX K

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27 Mr. Jakala: Here is what he says—

Mr. Miller: What—would you identify the exhibit there?

Mr. Jakala: It seems to be Exhibit No. 2. I'm not sure, because my exhibits are not marked. It's Exhibit 2, "State of Tennessee, County of Davidson" and it's Postal Inspector Palmer, who interviewed Mr. Neaveill.

Mr. Miller: It appears that it is No. 2, under Exhibit K.

Mr. Jakala: All right, on Page—I have it marked, if you look at Page 1, it is not—there is no reference to it, specifically, Page 2. He says, "I took the I.D. card"—this is Palmer, "I took the I.D. Card"—

Mr. McCarthy: Once again, you are mistaken in who you are identifying. This is a statement of Mr. Witt, taken by Postal Inspector Palmer at Nashville, Tennessee.

Mr. Jakala: I beg your pardon. You are right. Witt interviewed by Palmer, I beg your pardon. That is correct.

28 Now, here's what Witt said; "I did not notice the title of his job, but jumped at the conclusion".

Then, on the next page, Page 3, "I do not remember Neaveill ever stating he was a postal inspector, sworn to and subscribed before me this day, August of 1975".

And this was a statement taken by Palmer from Mr. Witt.

Now, Mr. Witt, if—now, Mr. Sprague, Mr. Witt's statement is part of your file, I assume?

The Witness: That is correct.

\* \* \*

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## APPENDIX L

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63 Q. Was he walking under his own power at that time?

A. Yes. He was wobbling.

Q. Was he wobbling, or weaving?

A. Yes, he was wobbling.

Q. He was wobbling and weaving?

A. Yes.

Q. Did you have an argument with him at that point?

A. No, we just carried on a conversation about his police work here in Chicago.

Q. You asked him what he did?

A. No, he stated that he was some kind of an officer here in Chicago.

Q. He just said that he was an officer in Chicago and didn't go beyond that at that point. Had you asked him for his identification?

A. No.

Q. Then, how long did this conversation last, if you recall, a minute, two minutes?

A. Approximately a minute.

\* \* \*

**APPENDIX M**

- 67 Q. You gave those guns to whom?  
A. Florida delegation leader.  
Q. Is there any reason why you didn't confiscate the guns?  
A. Yes, we thought he was a postal inspector, which is an agent of the Federal Government and he had the right to have the guns in Nashville.  
Q. But you did look at his identification card. You could have seen it was a postal inspector, isn't that correct?  
A. If I did take it from him and thoroughly gone over it, I'm not sure whether I would have, or not. I've never seen one before.  
Q. Then you sent him back up to the room, is that correct?  
A. The Florida delegation leader took him to his room.  
Q. Now, you are Mr. Turner, correct?  
A. No.  
Q. Mr. Taylor, I'm sorry.  
I show you Plaintiff's Exhibit No. 6 for identification and ask you if this bears your signature? (Indicating)  
. . .
- 70 Q. It says "Security Force", correct?  
A. Yes.  
It has a picture of Mr. Neaveill as regional chief inspector.  
Mr. Jakala: Thank you very much.  
I would like to introduce this.  
Mr. McCarthy: Could I see that, please?  
Mr. Jakala: I'm sorry. (Indicating)  
Any objection to that?  
Mr. McCarthy: None whatsoever.  
Mr. Jakala: I would like to introduce these two exhibits, if possible, into evidence.

Mr. McCarthy: Until you get that identified, I'm going to object to you introducing that.

Mr. Jakala: I will identify Exhibit No. 1 for identification as Badge No. 2299, Security Police, United States Postal Service and the other one is a security—it is an identification card, issued by the postal service, containing a picture of Mr. Neaveill, bearing his name, his social security number, 340-24-7845, identifying him as a security police officer.

. . .

**APPENDIX N**

- 89 A. No, sir, at that point, I was unloading the gun at this time and Officers Taylor and Thompson were talking to him. I was trying to get the gun unloaded.  
Q. You personally asked for an I.D. card, is that correct?  
A. No, sir, I didn't.  
Q. You never personally asked him for the badge?  
A. No, sir.  
Q. All you knew about the fact that he was a postal inspector was originally what Officers Manning and Winzer said, right?  
A. That after we took the gun away, there was an identification shown, he was a postal inspector.  
Q. Who did he show this identification to?  
A. Officer Thompson and Officer Taylor.  
Q. Do you know what he showed them?  
A. It was some type of badge. I was standing back and I didn't—  
Q. He showed them a badge. Did he show them anything else?  
90 A. Not that I know of, sir, not that I'd recall.  
Q. Did he show them an identification card?  
A. I couldn't say, sir.

Q. I show you this exhibit and ask you if you recall if this was shown?

A. Could I see it, please?

Q. You can look at it. (Indicating)

A. I'm not sure.

Q. You're not sure?

A. I couldn't say, no, sir.

Q. Okay. How about this particular—do you know, this is what I call a badge. We may not be talking about the same thing. Is this what you call a badge? (Indicating)

A. I would call that a badge. I'm not familiar—I was standing in the back, over to the side then.

Q. So, you really didn't see the identification, except you heard it was requested?

A. Yes, sir. I don't know if it was requested, or not. At that time, like I say, I was trying—mainly trying to get the gun unloaded.

Q. What happened after that?

91 A. Well, the delegation president of the Fraternal Order of Police from Florida was there and he stated that he would take care of Mr. Neaveill, see that he get to bed and that the guns would be returned to him in the morning.

Q. At that time was Mr. Neaveill in an intoxicated state, as far as you were concerned?

A. Yes, sir.

Q. You have that opinion. Do you believe your opinion is correct?

A. Yes, sir.

Q. He was wobbling at that time?

A. Yes, sir, he still was.

A. Speech was slurred?

A. Yes, sir.

Q. And perhaps he had a problem maybe understanding questions?

A. I wouldn't say he was that intoxicated.

Q. Well, when you say "intoxicated", he was wobbling, right?

A. Yes, sir.

Q. Couldn't walk on his own power?

A. Yes, sir, he could.

Q. Without help?

92 A. Yes, sir. Because he came back to the room by himself.

Q. But his speech was slurred?

A. Yes, sir.

Q. He gave you no real problem outside of that gun situation?

A. That was quite a bit of a problem.

Q. He didn't give—didn't resist in any form, did he?

A. He was overpowered so quickly that he wouldn't have had a chance to, really, there was three on one.

Q. Now, you say you are familiar with Tennessee law, right?

A. I'm familiar with it, yes.

Q. Well, you said that you know what the status of a federal inspector is, right?

A. They are commissioned to carry firearms.

Q. How did you discover that, before, or after the fact?

A. We discovered that at training school.

Q. Any other officers have authority to carry guns, federal officers, do you know?

93 A. Yes, sir, F.B.I., Secret Service, Postal Inspectors, we have some other—let's see, I can't remember all the other ones, but just, you know, those three off the top.

Q. Do you know anything about security officers, postal security officers?

A. No, sir, we don't have them in Nashville. So, I'm not familiar with them.

Mr. Jakala: Okay, I have no further questions of Mr. Turner.

. . .



## APPENDIX O

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The appellant testified that he did not recall telling anyone at the time he was relieved of his 9MM gun that he was a postal inspector. (Hrng. Trsep. p. 162); that when confronted later that morning in his room, he was asked "What is your employment status?"; and that he replied that he was "with the Postal Service, Postal Inspection Service, Security Police." (Hrng. Trsep. p. 163)

Notwithstanding the fact that the appellant's identification card (Appellant's Exhibit No. 2) clearly indicated he was a Security Police Officer, those identified above received the impression that he was a Postal Inspector. It is herein concluded that they received that impression just as they stated, by the appellant identifying himself as such. Motivation for such action was provided through uncontroverted testimony to the effect that Postal Inspectors may legally carry concealed weapons in Tennessee while Security Police Officers may not. The second charge is found to be fully supported by the evidence.

In regards to Charge 3, the specifications are found to constitute some of the basic elements of the first charge. These specifications are fully discussed under that charge. While the specifications themselves are found supported by the evidence, this reason will not herein be considered as a separate and distinct charge.

It is noted that with respect to the appellant's past record, he was informed of the action in writing, it was made a matter of record, and he was given the opportunity to dispute the action by having it reviewed, on its merits, by an authority different from the one who took the action. Thus, it is found that the specificity and detail requirements of Part 752 of the regulations were met. Hence the suspension could be considered in determining the severity of action proposed. Although appellant took exception to

the disciplinary action, based on a review of the record, it is found that the reasons for this action were not arbitrary, or capricious.

The appellant presented further argument to the effect that the Postal Service more severely disciplined the appellant than other employees who were found to have violated agency regulations in regards to the use of or the carrying of weapons. Seven witnesses were called in respect to this issue. In one case the agency was in the process of taking action but had issued no decision as to the actual form of disciplinary action. In another case no suspension had been imposed but there was no evidence that the agency was aware of any violation of regulations. Four individuals had received five day suspensions and one a ten day suspension. The witness who received the ten day suspension testified that this arose out of an incident wherein he fired a revolver in self defense. Those who received five day suspensions were involved in relatively less serious incidents.

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## APPENDIX P

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State of Tennessee.  
County of Davidson.

Personally appeared Charles J. Terio who first being duly sworn disposes and says.

On about 1100 AM the Aug 14 I accompied. two city police officers two Room 353 Ramada Inn. DownTown. To check out a delaget. We found a man id. as Phillip L. Neaveill sleeping. He was awaken and asked to id. himself. At that time as a postal insp. I asked him for his I.D. Card. He could not find his I.D. Card. After a search of the room Mr. Neaveill found his I.D. holder. It had

one Postal Badge 2299 and a I.D. Card number 305. I asked the subject about the incident at the party that night. He was very sleepy and not coherent.

I left and contacted the U.S. Postal Inspector. The mater was turned over to them.

/s/ Charles J. Terio  
U. S. Capitol Police  
Wash. D.C.  
Aug 16, 1975.

(Notarization)

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#### APPENDIX Q

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124 Mr. Jakala: Mr. James, the 10 days suspension that you received related to this incident, didn't it?

The Witness: Yes, sir, it did.

Mr. Jakala: And the Postal Department was fully advised of all of the circumstances surrounding this incident?

The Witness: Yes, sir, the same day that it happened.

Mr. Jakala: In other words, they were advised there was a gun fired and that you had fired it at your wife or at your wife's boyfriend, is that correct?

The Witness: That is correct.

Mr. Jakala: No further questions.

Mr. Miller: Any questions, Mr. McCarthy?

Mr. McCarthy: None.

Mr. Miller: Mr. James, I ask that you not discuss your testimony with people outside the room. I thank you for coming. You may be excused.

(Witness excused.)

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No. 78-315

Supreme Court, U. S.

FILED

OCT 22 1978

WILLIAM BODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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PHILLIP L. NEAVEILL, PETITIONER

*v.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

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MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION

---

WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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**MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION**

---

Petitioner seeks review of his dismissal from the United States Postal Service for conduct unbecoming a Security Police Officer. He argues that the dismissal cannot reasonably be said to promote the efficiency of the service and that the penalty of dismissal was so severe as to be arbitrary and capricious.



1. Petitioner was a Security Police Officer (SPO) with the United States Postal Service from 1972 to 1975 (Pet. App. 14a). He was discharged effective October 25, 1975, for engaging in "conduct unbecoming a Security Police Officer" during a convention in Nashville, Tennessee, on August 14 and 15, 1975 (Pet. App. 14a-15a). He appealed the decision to discharge him to the Federal Employees Appeals Authority of the Civil Service Commission and was granted an administrative hearing. Witnesses testified at the hearing that, contrary to agency regulations, petitioner had carried a concealed weapon on two occasions during the convention; that he was intoxicated and had to be forcibly disarmed by police officers; and that petitioner had falsely represented to police that he was a Postal Inspector (Pet. App. 16a). The administrative law judge upheld the decision of the Postal Service, finding that the charges of conduct unbecoming an SPO and impersonating a Postal Inspector had been substantiated. Further, the ALJ reviewed the agency's stated reasons for removal and petitioner's evidence as to agency decisions in other disciplinary actions and rejected petitioner's claims that discharge was too harsh a penalty in this case. The Appeals Review Board of the Civil Service Commission denied petitioner's request to reconsider the decision of the ALJ (Pet. App. 15a).

Petitioner then sought review in the district court, arguing again that the record did not support a finding that his removal would contribute to the efficiency of the service and that the decision to remove him was

arbitrary and capricious. The district court reviewed the administrative record in detail and concluded that "there is a rational basis which supports the removal of the plaintiff from the Postal Service in accordance with all the proper disciplinary procedures and appeals" (Pet. App. 18a).

The decision of the district court was affirmed by the court of appeals in open court. Later, in an unpublished order, the court expressly upheld the district court's determination that there was a rational basis for the agency's decision to dismiss petitioner. The court referred to its recent decision in *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977), in which it had ruled that in order to decide that a rational basis exists for an agency action the court must find both that the individual actually committed the acts charged and that the disciplinary action would promote the efficiency of the service. The court stated (Pet. App. 19a):

This is one of the cases referred to in *Young* where the circumstances underlying the dismissal make it readily appear that retention of the employee can rationally be found to have an adverse effect on the efficiency of the service. The agency's choice of discharge was not so disproportionate to the conduct involved as to be arbitrary or capricious.

2. In any event, the case presents no question appropriate for consideration in this Court. The district court correctly limited its review to an examina-

tion of the administrative record to determine whether the agency's action had a rational basis. *Wood v. United States Post Office Department*, 472 F.2d 96, 99 (7th Cir.), cert. denied, 412 U.S. 939 (1973). Petitioner is now merely restating factual arguments which were unsuccessful in the hearings below; there is no reason for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

OCTOBER 1978